Supreme Court, U.S.
FILED

No. 00-

001239 JAN 30 2001

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IN THE

Supreme Court of the United States

BOBBY MILLS,

Petitioner,

—v.—

HOME DEPOT, U.S.A., INC., a foreign corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Whether the Circuit Court of Appeals for the Eleventh Circuit failed to follow the applicable federal law established in the decisions of this Honorable Court by not considering evidence of other discriminatory acts by Home Depot as circumstantial evidence that created a factual dispute as to whether the firing of Mr. Mills for "conduct unbecoming" was only a pretext for a racially motivated termination by Home Depot.

List of Interested Persons and Corporate Disclosure Statement

Hn. Patricia A. Seitz, United States District Judge

Guy B. Bailey, Jr.

Bailey & Harper, P.L.

Bailey Harper Baker Arencibia & Agudo, P.A.

Wm. Bruce Harper, Jr.

James Feltman, Chapter 7 U.S. Bankruptcy Trustee for Bandsawe Corp.

Home Depot, U.S.A., Inc.

Bobby Mills

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Statement of Jurisdiction

The United States Court of Appeals for the Eleventh Circuit entered its opinion and final judgment in this cause on September 19, 2000 and affirmed the dismissal of Mr. Mills' claim against Home Depot U.S.A.,Inc for violation of Title VII of the Civil Rights Act of 1964, as amended. Mr. Mills' Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on November 1, 2000. This Honorable Court has discretionary jurisdiction to review this opinion and final judgment because it is in direct conflict with the holding of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 US 502, 113 S.CT. 2d 742, 125 L.Ed 2d 407 (1993). Even though Mr. Mills established a prima facie case of discrimination , the court below refused to consider those record facts to subsequently demonstrate the genuine issues of fact as to the truth of the reason proffered by Home Depot for firing Mr. Mills. *Hicks* clearly requires a reviewing court to consider prima facie facts when determining the issue of a pretextual firing. The statutory provision which confers on this Court the jurisdiction to review the judgment in question is 28 USCA § 1254(1).

Statement of The Case

This action was timely filed pursuant to a Dismissal and Notice of Rights entered by the U.S. Equal Employment Opportunity Commission. Originally filed in state court, this cause was removed to the U.S. District Court for the Southern District of Florida on October 20, 1998 based upon federal question and diversity jurisdiction under 28 USC Statutes 1331 and 1332. Federal question jurisdiction existed because the Petitioner Bobby Mills (Mr. Mills) based his claim for relief upon Title VII of

the Civil Rights Act of 1964, as amended. Since Mr. Mills was a resident of the State of Florida and the Respondent Home Depot, U.S.A., Inc. (Home Depot) was a foreign corporation incorporated in the State of Delaware, the District Court also had diversity jurisdiction.

The District Court entered both its Order Granting Defendants Motion for Summary Judgement and Summary Final Judgement on December 28, 1999. The District Court entered its Order Denying Plaintiff's Motion for Relief from Judgement on January 27, 2000. Mr. Mills timely filed his Notice of Appeal on January 27, 2000.

Material Facts

Mr. Mills filed this claim against Home Depot for wrongful termination because of racial discrimination based on the following facts which are undisputed by Home Depot in this record on appeal. These facts are contained in the depositions and exhibits thereto and answers to interrogatories filed herein and were completely overlooked and ignored by the Court below when it reviewed the record.

On September 18, 1997 around 6:30 p.m. Bobby Mills accompanied Juan Morales, Polly Powell and Kristy Hall to an Atlanta Braves baseball game in Atlanta, Georgia. Mr. Morales drove the rental vehicle. Mr. Mills was located in the right front passenger seat. Ms. Powell and Ms. Hall were seated respectively in the left and right rear passenger spaces. Mr. Mills was the only African-American in the car. The other passengers were Anglos.

All four persons in the car were in Atlanta attending a Management Training Seminar given by their employer Home Depot. At the end of the day's training session,

beer was made available by Home Depot to all employees at the hospitality suite where the seminar was held. Mr. Mills had consumed two cups of beer before he left for the game and Ms. Hall took her beer cup with her in the car on the way to the game. It was necessary for this group to follow other Home Depot employees in other cars because no one in Mr. Morales' car knew how to get to the Braves' stadium.

The rush hour traffic on Interstate 285 was described by Mr. Morales as "bumper to bumper at the time and no where to stop". Mr. Mills developed an urge to urinate which quickly progressed to pain and to the point he could no longer refrain from urinating. He complained to the others about his predicament and Ms. Powell stated that she told him to go behind the retaining column out of the public view.

At that point, Mr. Mills did relieve himself by discretely covering himself with his shirt and urinating into the empty beer cup provided by Ms. Hall. Mr. Mills disposed of the urine in the cup outside the vehicle. He did not exit the vehicle to urinate because of "traffic, too much pain from holding the urine and afraid of being arrested for indecent exposure for urinating in public, so what can I do". (Mills' Depo., pg. 35)

Mr. Mills concealed the act of urinating with his shirt. Neither of the females seated in the back seat could see what he was doing. Ms. Powell stated that she could hear and smell the urine when he poured the urine out of the cup outside the car. Ms. Hall stated however, that she could not see, hear or smell Mr. Mills' urination.

The "Associate Performance Notice" prepared by Les Lanier, Regional Loss Prevention Manager for Home Depot and given to Mr. Mills on October 14, 1997, charged that "Bobby's behavior shows a clear lack of

concern for the other associates in the vehicle. This conduct is unbecoming an Home Depot associate". The notice, without stating Mr. Mill's description of his own conduct, then immediately relieved Mr. Mills of his duties as a Loss Prevention Supervisor and permanently terminated his employment with Home Depot.

"Conduct unbecoming" is not defined in the "Associate Performance Notice" or anywhere in the Home Depot "Rules of Conduct" contained in the "Standard Operating Procedures" manual issued by Home Depot to its employees. The Rules of Conduct do prohibit any discrimination or harassment of a Home Depot employee by "failure to treat associates, customers, or vendors with respect". The "Overview" paragraph in the Rules of Conduct states that Home Depot established "standard common sense rules of conduct" necessary for the orderly and efficient way of running a business.

Argument

The established law by this Honorable Court, and previously in the 11th Circuit, is that a claimant may subsequently rely on the record facts previously used to establish a prima facie case to demonstrate the existence of genuine issues of fact as to the truth of the employer's proffered reason for firing the claimant. Once the plaintiff offers evidence that would permit a reasonable fact finder to disbelieve the employer's explanation the discharge, summary judgment is inappropriate. *St. Mary's Honor Center v. Hicks*, 509 US 502, 113 S.CT. 2d 742, 125 L.Ed. 2d 407 (1993). *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Circ.,1993) . *Batey v. Stone*, 24 F 3d 13 1330 (11th Circ.,1994)

This record establishes that Mr. Mills, an African-American, is a member of the protected group with an

unblemished record of eight and one half years as a Loss Prevention Supervisor prior to his termination. He was replaced by a non-minority individual. (Mills Depo. Pgs. 7-11). The only sworn testimony in this record about the material facts of the incident leading to Mr. Mills' termination comes from Mr. Mills' own deposition. His testimony about the incident was that he did nothing disrespectful of his fellow employees. To the contrary, his choice to relieve himself in the cup was his only viable option because of the traffic situation. (Mills Depo. Pg. 36.) To have urinated in his pants and on himself in the car would have been far more disrespectful of his fellow employees. Instead, he discretely covered himself and covertly used the cup. Only the unsworn "affidavit" of Polly Powell creates any factual issue that anyone made the slightest protest against Mr. Mills' actions. The sworn testimony of Mr. Mills quite plainly creates a disputed issue as to whether Mr. Mills' conduct was disrespectful of his fellow employees or in any way "unbecoming" in the context of the occurrence. If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment must be denied. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F 2d 1518 (11th Circ. 1992).

The Court below also failed to consider the facts in this record which presented evidence that similarly situated Home Depot employees not members of the protected group were treated more favorably. Mr. Thomas Endter, an Anglo Store Manager for the Respondent, directly admitted to Mr. Mills that he was not terminated by Home Depot despite his sexual harassment of a female Home Depot employee (Mills' Depo. Pgs. 47-49). Mr. Endter's actions described to Mr. Mills were clear cut violations of Home Depot's Rules of Conduct which expressly warn employees that sexual harassment is prohibited and likely to lead to termination. The

record also reveals that Mr. Mills reviewed a *Miami Herald* article that Mr. Paul West, a white Store Manager at Home Depot was publicly identified as a client of Kathy Willets, the infamous South Florida adulteress. However, this "unbecoming" conduct did not result in Mr. West's termination. He was merely transferred to another store.

Similarly, Mr. Charlie Boyd, a white Loss Prevention Supervisor at Home Depot's store no. 211 was identified in an article in the *Miami Herald* which was also reviewed by the Plaintiff as a participant in the Miami firefighters "scrotum on the head" initiation procedure. Home Depot took no disciplinary action on Mr. Boyd's clearly "unbecoming" conduct.

Mr. Mills also reviewed the Home Depot personnel file of one Mark Holloway, a white Department Head at Home Depot's store no. 210. The Defendant took only the minor disciplinary action of placing a notice in Mr. Holloway's personnel file prior to his promotion to Assistant Manager even though he referred Home Depot employee Dwayne Pittman as the "Nigger Driver".

Each of the instances described above demonstrate that Home Depot disciplined Mr. Mills in an entirely different manner (permanent termination) than it did other non-minority managerial employees who committed other violations of Home Depot's Rules of Conduct which were punishable by termination. The remaining five examples given in Answer 3 of Plaintiff's Response to Defendant's First Continuing Interrogatories also describe instances from which it may be inferred that Defendant Home Depot disciplined non-minority employees under entirely different conduct standards than it applied to the African-American employee, Mr. Bobby Mills. Use of the "N word" at Home Depot apparently is "becoming". Since the facts included in the record of this case and all reasonable inferences there-

from must be viewed in the light must favorable to Mr. Mills, a jury question was presented as to whether Home Depot's termination of Bobby Mills, an African-American, for "conduct unbecoming" was merely a pretext used by Home Depot to shroud a racially motivated termination. *McCabe v. Sharrett* 12 F 3d 1558 (11th Circ. 1994).

CONCLUSION

In summary, the facts contained in this record concerning the alleged commission by Mr. Mills of conduct "unbecoming" a Home Depot managerial employee at the very least demonstrate genuine issues of material fact. Whether Mr. Mills' action under the circumstances could be considered less than respectful to other employees and was unbecoming a Home Depot employee is a question for a jury. Since the record also establishes issues of material fact regarding the disparate termination of Mr. Mills, an African American, for questionable "conduct unbecoming", in comparison with the non terminable, slight discipline of white management employees for egregiously unbecoming conduct, a reasonable finder of fact could conclude that Mr. Mills was fired on a pretext. The U.S. Court of Appeals for the Eleventh Circuit did not consider these prima facie record facts of discrimination when it held that the firing of Mr. Mills was not pretextual. The court below failed to follow the law established in *Hicks* and its ruling is in direct conflict with this Court's holding in that case.

Respectfully Submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10696
Non-Argument Calendar
Filed SEP 19, 2000

D.C. Docket No. 98-02427-CV-DAS

BOBBY MILLS,

Plaintiff-Appellant,

—versus—

HOME DEPOT U.S.A., INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(September 19, 2000)

Before TJOFLAT, COX and BLACK, *Circuit Judges.*

PER CURIAM:

Appellant Bobby Mills appeals the district court's grant of summary judgment in favor of Appellee Home Depot, U.S.A., Inc., on Appellant's action for wrongful termination brought pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1). On appeal, Appellant claims the district court erred by granting, Appellee's motion for summary judgment by default. Based upon a review of the record, we affirm.

We review de novo the district court's grant of summary judgment. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (2000). In assessing a motion for summary judgment, we must examine the evidence in the light most favorable to the non-moving party. *See id.* A district court may not enter summary judgment solely to sanction a party for failing to respond to a summary judgment motion. *See Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cit. 1988). A district court may, however, grant an unopposed motion for summary judgment when the non-moving party fails to "direct the district court's attention to . . . [evidence] which established that there were genuine issues of material fact." *Id.*

In this case, Appellee demonstrated there was a legitimate, nondiscriminatory reason for Appellant's termination. *See Standard v. A.B.F.L. Services, Inc.*, 161 F.3d 1318, 1334 (11th Cir. 1998). Appellant failed to present evidence showing that this reason was pretextual. *See id.* The district court therefore properly granted summary judgment to Appellee.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10696-II
Filed NOV 1, 2000

BOBBY MILLS,

Plaintiff-Appellant,

—versus—

HOME DEPOT U.S.A., INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the District of

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Before TJOFLAT, COX and BLACK, *Circuit Judges.*

PER CURIAM:

The petition(s) for rehearing filed by Bobby Mills is DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAR 1 2001
OFFICE OF THE CLERK

No. 00-1239

In The

Supreme Court of the United States

-- BOBBY MILLS,

Petitioner,

v.

HOME DEPOT U.S.A., INC.,
a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTION PRESENTED

Pursuant to Sup. Ct. R. 15.2, respondent objects to the question presented by the Petitioner because it is unduly argumentative in violation of Sup. Ct. R. 14.1(a) and seeks consideration of a question not appropriately arising from or otherwise accurately reflecting the proceedings or the holding below. If this Court grants the petition, based on this question, Respondent submits that the following is a more accurately phrased question:

> WHETHER THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT, HOME DEPOT, WHERE IT HELD THAT RESPONDENT DEMONSTRATED A LEGITIMATE, NON-DISCRIMINATORY REASON FOR TERMINATING THE PETITIONER AND THE PETITIONER FAILED TO PRESENT ADMISSIBLE EVIDENCE OF THE EXISTENCE OF MATERIAL, DISPUTED FACTS SHOWING THAT THIS REASON WAS PRETEXTUAL.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent submits the following list of interested persons and a complete list of Respondent's parent corporations and publicly held companies that own 10% or more of Respondent's stock:

1. Home Depot International, Inc.
2. Home III, Inc.
3. THD Bermuda, Ltd.
4. Homelease, Inc.
5. MB Food Service, Inc.
6. Homer II, Inc.
7. JABS Realty, Inc.
8. Go Blue, Inc.
9. Home TLC, Inc.
10. Home Depot Recycling, Inc.
11. The Home Depot Special Services, Inc.
12. Home Depot of Grenada, Inc., and its subsidiaries
13. Elizabeth P. Johnson
14. Steven E. Stark
15. Christopher E. Knight
16. Michael Angel Puchades
17. June Galkoski Hoffman
18. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Home Depot U.S.A., Inc., ("Home Depot"), requests that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 19, 2000, because the appellate court's decision does not conflict with the rulings of this Court and is otherwise correct.

STATEMENT OF THE CASE

Respondent cannot accept Petitioner's Statement of the Case because it omits or otherwise mistates certain pertinent procedural facts, is argumentative with regard to its statement of material facts, and sets forth purported "undisputed" facts that are misleading. Sup. Ct. R. 15.2 and 24.2. The following additional matters should be considered by the Court in ruling on the instant petition.

Course of Proceedings

By Order dated March 24, 1999, the District Judge established a discovery deadline of September 24, 1999. (Record 19). On April 12, 1999, Defendant Home Depot took the deposition of the Plaintiff. (Record 22). The Plaintiff, Bobby Mills ("Mills"), took no depositions in this case.

Pursuant to the Scheduling Order, Home Depot filed its Motion for Summary Judgment on November 8, 1999, supported by a Memorandum of Law and a Statement of

Material Facts As To Which There is No Genuine Issue To Be Tried. (Record 22). Plaintiff's response was due November 24, 1999. One week after his response was due, Plaintiff filed a Motion for Enlargement of Time to respond to the motion for summary judgment. (Record 23). The District Court granted the untimely Motion for Enlargement, but warned Plaintiff that a response had to be submitted by December 17th. (Record 24). Notwithstanding the Court's Order, Plaintiff filed his response to Home Depot's motion for summary judgment five days late, on December 22nd. (Record 28). Plaintiff did not seek leave to file an untimely brief. The only record evidence submitted with Plaintiff's response was excerpts from his own deposition testimony and several references to exhibits introduced at his deposition. (Record 28).

On December 28, 1999, the District Court granted Home Depot's motion for summary judgment, stating, *inter alia*, that "the material facts set forth in a moving party's statement will be deemed admitted unless controverted by the opposing party's statement. S.D. Fla. L.R. 7.5," and noted that the Plaintiff had failed to file a response to the motion, notwithstanding a lengthy extension. (Record 29).[1] Three weeks after issuance of the Order granting summary judgment, Plaintiff made a motion for relief from judgment, which the District Court denied on January 25, 2000. (Record 37 and Record 38).

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[1] Apparently, the District Court was not aware at this juncture that Plaintiff had filed a response – five days after it was due.

A timely Notice of Appeal was filed, and the record before the Court of Appeals included Plaintiff's belated submission. (Record 28 and 39).

STATEMENT OF FACTS

This is a case of alleged racial discrimination arising out of the termination of Petitioner Bobby Mills' employment with Home Depot. Mills was discharged by Home Depot for violating the company's Rules of Conduct[2] after an investigation revealed that Mills had urinated in a cup while in a company rental car, in the presence of three other Home Depot employees, including two female associates. (Defendant's Statement of Material Facts, para. 4, Record 22). Mills did not dispute that the incident occurred, only that it was "necessary" and "appropriate." (Appellant Brief, p.4). Mills presented no direct evidence of discrimination in this case. The only "evidence" proffered to the District Court was Mills' uncorroborated assertion that other white Home Depot employees had received more lenient treatment. (Record 28). Mills acknowledged in his deposition that he had no personal knowledge of the circumstances surrounding the offense, if any, each of the alleged comparators committed, the time frame of the alleged incidents, any personnel decisions made in response to those incidents, nor

[2] Home Depot's Rules of Conduct provided that "failing to treat associates, customers or vendors with respect" constitutes an example of "conduct which may result in disciplinary action, including termination." (Record 22, App. Exh. E, p.2).

the identity of the decision makers. (Defendant's Statement of Material Facts, paras. 8 & 9, Record 22).

REASONS FOR DENYING THE WRIT

THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT, HOME DEPOT, WHERE IT HELD THAT RESPONDENT DEMONSTRATED A LEGITIMATE, NON-DISCRIMINATORY REASON FOR TERMINATING THE PETITIONER AND THE PETITIONER FAILED TO PRESENT ADMISSIBLE EVIDENCE OF THE EXISTENCE OF MATERIAL, DISPUTED FACTS SHOWING THAT THIS REASON WAS PRETEXTUAL

I. THE COURT OF APPEALS' RULING DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

Petitioner seeks review of the Eleventh Circuit's decision based upon his contention that the appellate court's decision conflicts with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). *See* Sup. Ct. R. 10(c). The Court of Appeals' decision, however, is not only consistent with *Hicks*, but also with this Court's recent pronouncement on the issue of the parties' respective burdens of proof in employment discrimination cases and the standard for determining when a defendant is entitled to judgment as a matter of law. Notably, Petitioner failed to cite this decision in his petition. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Petitioner has failed to demonstrate a compelling reason to

grant the writ, and, accordingly, the Petition should be denied. Sup. Ct. R. 10.

In upholding the summary judgment entered by the trial court in this action, the Court of Appeals' opinion reflects that it properly concluded: (1) it should review *de novo* the district court's grant of summary judgment; (2) in assessing a motion for summary judgment the court must examine the evidence in the light most favorable to the non-moving party; and (3) a district court may not enter summary judgment solely to sanction a party for failing to respond to a summary judgment motion. (Petitioner's App. 2a). In applying the foregoing principles to the record in the case, the Court of Appeals stated:

> A district court may, however, grant an unopposed motion for summary judgment when the non-moving party fails to 'direct the district court's attention to . . . [evidence] which established that there were genuine issues of material fact.' *Id.*
>
> In this case, Appellee demonstrated there was a legitimate, nondiscriminatory reason for Appellant's termination. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1334 (11th Cir. 1998). Appellant failed to present evidence showing that this reason was pretextual. *See id.* The district court therefore properly granted summary judgment to Appellee. 161 F.3d at 1334.

(Petitioner's App. 2a).

In *Standard*, which the Court of Appeals cited in its opinion below, after noting that the company had advanced specific non-discriminatory reasons for its failure to promote the plaintiff, the Court stated:

> Faced with these legitimate, non-discriminatory reasons, Standard must now show that

> they are pretextual. However, Standard has not presented any particular evidence tending to discredit the proffered reasons. He relies on the same evidence he has introduced for his prima facie case, specifically that Plaster Concepts hired a Hispanic production supervisor and the statement allegedly made by Hicks. This evidence falls far short of establishing pretext in light of the proffered nondiscriminatory reasons. '[A] plaintiff may not in all cases merely rest on the laurels of her prima facie case in the face of powerful justification evidence offered by the defendant.' *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). . . .

Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1334, *reh'g en banc denied*, 172 F.3d 884 (11th Cir. 1999).

In the instant case, the Court of Appeals' citation to this language reveals that the Court clearly applied the proper test and, contrary to Petitioner's assertion, considered the entire record in making its ruling. Rather than reveal a basis to conclude that the Court's holding conflicted with a Supreme Court decision, Petitioner's brief merely reveals that it disagrees with the outcome below. Petitioner's purported jurisdictional issue is little more than a chimera that is based on a misstatement of the record, a misapplication of the law, and a misapprehension of the actual holding below. It does not provide any overriding basis for this Court to exercise its discretionary jurisdiction. Further, it provides no statutory or rule based reason for this Court to even exercise its discretion in the initial instance because no actual conflict even exists. *See generally* Sup. Ct. R. 10.

There is no Supreme Court precedent that supports Petitioner's contention that the facts supporting a plaintiff's

prima facie case *alone* will be sufficient to establish pretext in the face of undisputed evidence of a legitimate, non-discriminatory reason for the challenged action. This Court has made clear in *Reeves* that a plaintiff in an employment discrimination case who lacks direct evidence of discriminatory motive cannot rely solely upon his *prima facie* case:

> Thus, a plaintiff's prima facie case, **combined with sufficient evidence to find that the employer's asserted justification is false**, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> * * * *
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. . . . For purposes of this case, we need not – and could not – resolve all the circumstances in which such factors would entitle an employer to judgment as a matter of law. . . .

120 S. Ct. at 2109 (emphasis added).[3]

Hicks made the same point when this Court stated that "Quite obviously, . . . what is required to establish the McDonnell Douglas *prima facie* case is infinitely less

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[3] As this Court stated in *Reeves*, the standard for summary judgment mirrors the standard for judgment as a matter of law and that under each the inquiry is the same. *Reeves*, 120 S. Ct. at 2110.

than what a directed verdict demands." *Hicks*, 509 U.S. at 515.

In the instant case, both courts below applied a standard that is no different than that identified in *Hicks* or *Reeves*. The Court of Appeals correctly concluded, after a *de novo* review of the record, that the Petitioner simply failed to present sufficient, probative proof to refute Home Depot's non-discriminatory explanation. Initially, the Petitioner failed to submit any response to the motion for summary judgment at all, which correctly led the District Court to conclude that Home Depot's statement of material facts would be deemed admitted. Petitioner then belatedly submitted evidence which consisted of record excerpts of his own deposition testimony and some exhibits introduced at that deposition. The Court of Appeals reviewed this record *de novo* and concluded that the Petitioner had failed to present evidence that the reason proffered by the employer for the termination was pretextual. This is consistent with established law, and therefore, the petition should be denied.

II. THE PETITIONER FAILED TO DEMONSTRATE THAT THERE WERE ANY MATERIAL, DISPUTED FACTS TO BE TRIED THAT WOULD PROVE HOME DEPOT'S LEGITIMATE, NON-DISCRIMINATORY REASON WAS A PRETEXT FOR DISCRIMINATION

In addition to his mistaken recitation of the Court of Appeals' holding and the misapplication of this Court's decisions, Petitioner's argument rests upon a mistaken assumption regarding his burden of proof. Implicit in Petitioner's brief is the assumption that facts supporting

a *prima facie* case can overcome Respondent's proffer of a legitimate, non-discriminatory reason for the adverse employment action. This is not the law. Having made such a proffer, Petitioner must come forward with additional, admissible evidence of undisputed material facts that would permit the fact finder to conclude that an impermissible motive existed. Mills simply failed to do this.

Summary judgment must be granted if, viewing the evidence in the light most favorable to the party opposing the motion, there is no genuine issue to be tried. *See* Fed. R. Civ. P. 56(c); *Kee v. National Reserve Life Ins. Co.*, 918 F.2d 1538, 1540 (11th Cir. 1990). Only genuine disputes of fact that might affect the outcome of the suit under governing law will successfully defeat a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To defeat summary judgment, the non-moving party must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000). As demonstrated below, there was no genuine dispute of material fact that would support a verdict for Petitioner in this action.

Petitioner asserts that his race was a motivating factor in Home Depot's decision to terminate his employment. Petitioner proffered no direct evidence that the decision to terminate Mills' employment was motivated by a racial animus against black employees, and accordingly, Mills must rely on the familiar *McDonnell-Douglas/ Burdine* burden-shifting order of proof. *See Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In the absence of direct evidence, to establish a *prima facie* case of disparate treatment, Mills must show that: (1) he was a member of a protected class under Title VII, (2) he was qualified for the job from which he was dismissed, (3) the misconduct for which he was dismissed was "nearly identical" to the misconduct of employees outside the protected class, and (4) that sufficient direct and/or circumstantial evidence exists to infer a nexus or causal connection between the protected classification and the disparate treatment. *See generally Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1185 (11th Cir. 1984), *reh'g denied en banc*, 747 F.2d 710 (11th Cir. 1984). While Home Depot argued in its motion for summary judgment that Mills failed to establish his *prima facie* case because he did not proffer any admissible evidence that similarly situated Caucasian employees were retained by Home Depot, *see Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1311-312 (11th Cir. 1998), the Court of Appeals apparently assumed that a *prima facie* case had been made. Accordingly, Home Depot will assume *arguendo* that such a *prima facie* showing existed. However, as the Court of Appeals correctly concluded, Petitioner failed to establish that the reason proffered for the termination was pretextual.

Home Depot clearly proffered a legitimate, non-discriminatory reason for the termination. There was undisputed evidence that Home Depot had a written Code of Conduct and that Mills' supervisors terminated his employment based upon that company policy. (Record 22 and 28). Mills never disputed the fact that (1) the policy existed, or (2) that the events occurred. (Record 28). In addition, Mills never proffered any evidence that the

reason was either implausible or that Home Depot proffered additional or inconsistent reasons for the termination. In contrast, the plaintiff in *Reeves* "made a substantial showing that [the employer's] explanation was false." *Reeves*, 120 S. Ct. at 2107.

Instead, the gravamen of Petitioner's argument is stated in his Conclusion: "Whether Mr. Mills' action under the circumstances could be considered less than respectful to other employees and was unbecoming a Home Depot employee is a question for the jury." (Petition at 7). That decision, however, is squarely within the province of an employer's managerial discretion. Petitioner is, in essence, asking the courts to interject their opinion as to whether the severity of the punishment was justified. Mills' supervisors concluded that he had acted in a manner unbecoming a veteran member of management, and made the decision to terminate his employment on that basis. (Defendant's Stmt. of Facts, Record 22, 3). The law is well-settled that an employer may expect a higher level of conduct from a management level employee than non-management personnel. *See, e.g., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1042 (7th Cir. 1993), *reh'g en banc denied*, 1993 U.S. App. LEXIS 27267 (7th Cir. 1993) (employer "entitled to enforce a no-dating policy . . . against supervisors, who by virtue of their managerial positions are expected to know better than subordinates."); *Castleberry v. Boeing Co.*, 880 F. Supp. 1435, 1441 (D. Kan. 1995) (holding that termination of male managerial employees who, at the request of a female nonmanagerial employee, purchased and displayed a sex object at an office birthday party, was a legitimate, nondiscriminatory reason because Boeing

expected a higher standard of conduct from management); *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067, 1078 (W.D. Mich. 1982) (in age discrimination claim, the employer acted "within its legitimate prerogative in requiring higher performance standards for management personnel" than for nonmanagement personnel). Mills admits that "as a member of management [he] was responsible for holding [himself] to a higher standard of conduct." (Defendant's Stmt. of Facts, para. 5, Record 22, 4). Whether or not Mills believed "he did nothing disrespectful of his fellow employees" is irrelevant. (Petitioner's Br. at 5). The employer is entitled to interpret its employment decisions in any manner the employer chooses, so long as that decision or interpretation is not performed in a discriminatory fashion. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d at 1187.

Having proffered a legitimate, non-discriminatory reason for the termination, Petitioner then bore the burden of demonstrating that the reason proffered was pretextual. While this Court in *Reeves* has made clear that there are a number of ways to prove pretext, including proof that the reason proffered was false, the law is clear that the Petitioner must proffer *some* evidence to undermine that reason. Petitioner cannot simply rely, as here, upon his *prima facie* case.

As stated *supra*, Petitioner proffered no evidence to discredit the employer's reason for the discharge. Instead, Petitioner argued, based on hearsay and anecdotal evidence, that Caucasian employees at Home Depot had been treated more leniently. Such a generalization, particularly in the absence of admissible evidence, will

not suffice to meet Petitioner's burden of proof at this stage of the burden-shifting analysis.

The courts have consistently taken a strict approach to what constitutes a "similarly situated" employee for the obvious reason that if a court is over-inclusive, it begins to substitute its judgment for the business judgment of the employer. *See, e.g., Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) ("it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways."); *Ward v. Procter & Gamble Paper Products Co.*, 111 F.3d 558 (8th Cir. 1997) (two employees not similarly situated, although they were involved in the same altercation, where their conduct was different and they had different disciplinary histories); *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1247 (6th Cir. 1995) (individuals with whom plaintiff seeks to compare his treatment must have dealt with the same supervisor, been subject to the same standards and engaged in the same conduct); *Nix*, 738 F.2d at 1186-87 (while two employees violated the same policy, the circumstances were different so they were not "similarly situated" – [I]f an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown.").

No admissible evidence was proffered in this case that any employee outside Petitioner's protected class, supervised by Les Lanier, committed the same or even similar offense and was treated differently. Rather, Petitioner was content to rely upon his own anecdotal evidence proffered during his deposition to establish this critical element of his case. During his deposition, Petitioner admitted that he had no personal knowledge of

what offense, if any, the alleged comparators committed, the dates of either the alleged incidents or any personnel decisions made in response, nor the identity of the decision makers. Rather, Mills testified that his knowledge is based entirely upon "word of mouth." (Defendant's Stmt. of Facts, para. 9, Record 22, 5-6). Mills' self-serving assertions on this issue is inadmissible hearsay and could not defeat Home Depot's motion for summary judgment. *See Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1132, *amended on reh'g*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *Bush v. Barnett Bank of Pinellas County*, 916 F. Supp. 1244, 1256 (M.D. Fla. 1996) (holding that the court may not consider inadmissible hearsay when deciding a motion for summary judgment); *Griffin v. City of Milwaukee*, 74 F.3d 824 (7th Cir. 1996) (inadmissible hearsay could not preclude summary judgment in favor of defendants); *Rizzo-Puccio v. College Auxiliary Servs.*, 71 F. Supp. 2d 47 (N.D.N.Y. 1999), *affirmed*, 216 F.3d 1073 (2d Cir. 2000) (employee's deposition testimony, recounting instances when other female employees allegedly told her that supervisor treated them poorly, constituted "hearsay" that could not be considered an employer's motion for summary judgment in Title VII action).

In sum, the evidence was undisputed that Mills engaged in conduct that he understood was grounds for termination pursuant to the Employee Handbook and the Rules of Conduct. (Defendant's Stmt. of Facts, para. 5, Record 22). Home Depot had a legitimate reason to terminate Petitioner's employment for a violation of its Code of Conduct. As the Court of Appeals correctly concluded,

once Home Depot proffered a legitimate, nondiscriminatory reason for the termination, to survive summary judgment, Mills needed to proffer admissible evidence that Home Depot's reason for the adverse employment action was pretextual. *See* Fed. R. Civ. P. 56(e) ("supporting and opposing affidavits . . . shall set forth such facts as would be admissible in evidence . . . ").

Pretext cannot be proven "merely by questioning the wisdom of the employer's reason." *See Combs v. Meadowcraft, Inc.*, 106 F.3d 15-19 (11th Cir. 1997). Plaintiff must demonstrate " 'such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for this action that a reasonable fact finder could find them unworthy of credence.' " *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987) (plaintiff is required to do more than show proof of a *prima facie* case to avoid summary judgment). Plaintiff here proffered no evidence to discredit the reasons for his termination and no admissible evidence that anyone outside his protected class had been treated any differently. The Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent Home Depot requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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